In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 397

ALFRED C. GAUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 895-907) is reported in 184 F. 2d 284.

JURISDICTION

The judgment of the Court of Appeals modifying the judgment of conviction of petitioner and affirming the judgment as modified was entered on July 28, 1950. (R. 908.) A petition for rehearing and a motion to modify judgment were denied

September 18, 1950. (R. 918.) On October 13, 1950, the time for filing a petition for a writ of certiorari in this case was extended to November 1, 1950, by Mr. Justice Frankfurter, and the petition for a writ of certiorari was filed on November 1, 1950. (R. 919.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether a conviction under Section 145 (b) of the Internal Revenue Code—penalizing a willful attempt in any manner to evade or defeat a tax—may be sustained where the knowing filing of a false and fraudulent return constitutes the affirmative willful attempt to evade and defeat the tax.

2. Whether it was error to affirm the judgment of conviction as modified on Count 5 of the indictment.

3. Whether the District Court correctly instructed the jury.

4. Whether the evidence was sufficient to sustain the conviction.

STATUTES INVOLVED

INTERNAL REVENUE CODE:

Sec. 145. PENALTIES.

* * * * *

(b) FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to

collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) [as added by Section 136(b), Revenue Act of 1942, c. 619, 56 Stat. 798] Any individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

Sec. 3616. PENALTIES.

Whenever any person—

(a) FALSE RETURNS.—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

* * * * *

He shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 3616.)

CRIMINAL CODE.

Sec. 35 (A) [as amended by the Act of April 4, 1938, c. 69, 52 Stat. 197].

. . . whoever shall knowingly and wilfully . . . make or cause to be made any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

(18 U.S.C. 1946 ed., Sec. 80.)

STATEMENT

Petitioner was indicted on March 11, 1949, on six counts. (R. 1-6.) Counts 1, 2, and 3 charged that he wilfully attempted to evade and defeat a large part of the income taxes of himself and his wife by filing false and fraudulent joint income tax returns for the years 1944, 1945, and 1946 in violation of Section 145(b) of the Internal Revenue Code. Counts 4 and 6 concerned amended returns and were dismissed by the District Court before trial. (R. 7.) Count 5 alleged the wilful making of a false statement by petitioner in a matter within the jurisdiction of an agency of the

United States, by filing with the Collector of Internal Revenue for the District of Massachusetts the false joint income tax return for himself and his wife for 1946 in violation of Section 35(A) of the Criminal Code.

After a trial to a jury, petitioner was acquitted on Count 1 and found guilty on Counts 2, 3, and 5. (R. 17.) Motions in arrest of judgment and for a new trial were denied. (R. 18-19.) He was sentenced to concurrent terms of imprisonment for eighteen months on each of these three counts and was given fines of $2,000 on each. (R. 21-22.) The Court of Appeals for the First Circuit modified the judgment by striking the $2,000 fine separately imposed on Count 5, and affirmed the conviction and sentences so modified. (R. 907.) Petitions for rehearing and to modify judgment were thereafter denied by the court below on September 18, 1950. (R. 918.)

Petitioner was, during the years in question, president of the Merrimac Mills Company, a weaving mill corporation which was founded in 1931 and controlled by himself and his family. (R. 226, 447, 487.) Merrimac Mills Sales Company, a corporation two-thirds of whose stock was owned by petitioner's daughter, sold the products of Merrimac Mills Company. (R. 228-229.) Petitioner had a sole proprietorship, Alfred C. Gaunt & Company, which acted as selling agent for these two corporations. (R. 230-232.) The proprietorship received commissions on the sale of goods to Mer-

rimac Mills Sales Company and again on the sale by that company to the trade. (R. 131-132.) On December 28, 1945, the proprietorship was converted to a corporation, Alfred C. Gaunt & Company, Inc., with all of the capital stock in the hands of the petitioner and his son. (R. 235.) One of petitioner's sales agency customers was H. Feld & Company, incorporated in 1945 as Felco Fabrics Corporation. (R. 31-32.)

Petitioner filed joint returns for himself and his wife for the calendar years 1944, 1945, and 1946. (Ex. 1, 2, and 3.)[1]

In each of these returns petitioner wholly omitted "finders" commissions totalling $3,739.05 in 1944, $6,788.01 in 1945, and $2,189.65 in 1946, paid to him by Hyman Feld of H. Feld & Company, later Felco Fabrics Corporation. (Ex. 15a-h, 16a-g, 17a-d, R. 31-41; Ex. 1, 2, 3.) These commissions were paid by check to compensate the petitioner for using his influence with Merrimac Mills Company and Merrimac Mills Sales Company to secure additional cloth for Feld during the period of wartime scarcity. (R. 31-41.) Petitioner contended that he had offset these unreported commissions against unreported out-of-pocket traveling expenses. (R. 313.) However, his returns showed substantial travel expense deductions; no proof of additional unreported expenses was presented; and part of the 1945 com-

[1] The exhibits are inserted in the record following page 699.

missions were shown to have been used for Government Bond purchases (Ex. 16c, R. 559) and part of those for 1946 went into an account used for political campaign funds. (Ex. 17c, R. 586). In the 1945 return, petitioner failed to report $43,-470.60 in commissions received by Alfred C. Gaunt & Company from Merrimac Mills Company and Merrimac Mills Sales Company. (R. 323, Ex. 2.) To justify this omission from gross commissions in the amount of $71,357.86, petitioner claimed that he had made an off-the-return substraction of a loss on a judgment against one Ashworth in the amount of $36,470.60 and a similar loss of $7,000 on a contingent agreement which he claimed to have made with Merrimac Mills Company. (R. 323, 328.) The story on the Ashworth judgment is as follows: The predecessor corporation of Merrimac Mills Company was Merrimac Mills, Inc., of which petitioner was principal stockholder (R. 219) and which went into receivership in 1931 (R. 219-221, 231-232). Petitioner bought all of the assets of this defunct corporation at a receivership sale in 1935 for $1,000. (R. 325-326.) The $25,000 unsecured note of one Ashworth was included in the assets. (R. 323, 325-326.) In 1945, petitioner settled a $37,795.60 (including interest) New York judgment he had obtained on this note for the sum of $1,325. (R. 327-328.) The contingent agreement "loss" was based on a purported agreement not authorized or ratified by the directors of Merrimac Mills Company but made

by petitioner for Merrimac Mills Company with himself in his individual capacity. (R. 280-281, Ex. F.) By this agreement petitioner was to receive payment of $20,000 in back salary (the corporate books showed no salary owing); reimbursement for a $5,000 contribution (which his son actually made); repayment of a contribution of stock allegedly worth $8,075 (but actually worth $1,615); and repayment for debts of the defunct Merrimac Mills, Inc., allegedly paid by petitioner in the sum of $25,152.17. (There was no evidence that Merrimac Mills Company was in any way obligated to petitioner.) This contingent agreement was an invention of the petitioner intended and used solely for tax purposes. (R. 469, 479.) No liability appeared on the corporation books nor was any payment recorded as having been made pursuant to the agreement. (R. 605, 145-147.)

Petitioner wholly omitted capital gains on dealings with the firm of Merrill, Lynch, Pierce, Fenner & Beane in wool top futures in the amount of $1,475 in 1945. (R. 76, Ex. 2.) He told the examining agents that he could not find a line on the return on which to report such gain. (R. 624-625.) His explanation at the trial was that the item was inadvertently overlooked. (R. 300.) He had omitted a similar item on his 1944 return (R. 300) but in 1943 he had correctly reported a loss on wool top futures (Ex. 8) and he reported interest paid to his broker in 1945. (Ex. 2, J-2). Wool top futures transactions with a

second broker did not appear to be reported but were claimed to be lumped in business income of Alfred C. Gaunt & Company. (R. 544-545.)

Petitioner failed to report a $30,000 bonus check dated December 31, 1945, received from Merrimac Mills Company, on his 1946 return. (Exs. 3, 45, R. 134-135.) In this year also, he failed to include $4,500 in checks constituting salaries from Merrimac Mills Sales company and a total of $12,-621.90 in salary from Alfred C. Gaunt & Company, Inc. (Exs. 3, 43, 44, R. 128.) When petitioner prepared his figures prior to filling out his 1946 return, he added the following: $20,000 of the bonus item, the two salary figures, a $6,000 bonus paid his wife by Merrimac Mills Sales Company (R. 577) and $11,300.75 (the amount of his commissions from Merrimac Mills Sales Company) and arrived at an erroneous total of $51,200.75. From this total he subtracted $35,285.29, the balance of the "contingent account" figures. (Ex. T-1, T-2.) The resulting balance of $15,915.46 was placed in Schedule C on his return as total receipts from business. (Ex. 3.)

He entirely omitted $38,257.70 of accrued commissions paid him by Merrimac Mills Company in 1946 (Ex. 25) both from his own computations and his return. This amount he said he forgot (R. 392-393) although he had access to his records of bank deposits (R. 576).

In both 1945 and 1946, petitioner took double deductions on certain items. (R. 552, 555-557,